

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>RACHEL JESPERSEN,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>H&amp;R BLOCK MORTGAGE</b>	:	<b>No. 06-1212</b>
<b>CORPORATION,</b>	:	
<b>Defendant.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**July 13, 2006**

Plaintiff Rachel Jespersen brings this sexual harassment and sex discrimination action against Defendant H&R Block Mortgage Corporation (“H&R Block”). Jespersen avers that her co-workers sexually harassed her during her five-month employment with H&R Block, and Defendant subsequently terminated her employment based upon her sex and in retaliation for her complaints of sexual harassment. Jespersen brings her claims pursuant to the Equal Rights Amendment of the Pennsylvania Constitution (“PERA”). Presently before the Court is Defendant’s motion to dismiss. For the reasons below, the Court grants Defendant’s motion.

**I. BACKGROUND**

Jespersen, a citizen of Pennsylvania, filed this action in the Court of Common Pleas of Bucks County, Pennsylvania, on February 10, 2006. (Notice of Removal ¶ 1.) H&R Block, a corporation organized under Massachusetts law with its principal place of business in California, timely filed a notice of removal based on diversity jurisdiction. (*Id.* ¶¶ 2, 5, 7-8.) Jespersen worked as a Senior Loan Officer for H&R Block at its Trevoze, Pennsylvania location from November 15, 2004 to April 19, 2005. (Compl. ¶¶ 5-7.) Jespersen avers that from the first day of her employment she endured

constant sexual harassment by her male coworkers. (*Id.* ¶¶ 8-13.) She alleges that she was subjected to: (1) offensive sexual comments, questions, and insults about her body and other women's bodies; (2) pornography displayed on coworkers' computers; (3) suggestions that she should wear revealing clothing or engage in sexual conduct with a manager in order to gain favor; and (4) objects being thrown at her buttocks and breasts. (*Id.* ¶¶ 14, 18-23, 30-34.)

According to Jespersen, numerous supervisory employees had actual or constructive knowledge of her coworkers' conduct but failed to remedy the situation. (*Id.* ¶¶ 12, 17, 23-25, 28-29, 35-37.) She registered verbal complaints of sexual harassment with a manager in December of 2004 and January of 2005 and with another manager in March of 2005. (*Id.* ¶¶ 24, 28, 36.) Neither manager took appropriate steps to stop the harassment. (*Id.* ¶¶ 25, 29, 37.) On April 19, 2005, H&R Block terminated Jespersen, allegedly because of her sex and in retaliation for her sexual harassment complaints. (*Id.* ¶ 38.)

Jespersen asserts her claims of sexual harassment, sex discrimination, hostile work environment and retaliation exclusively under the PERA. (*Id.* ¶ 41.) She seeks compensatory damages for lost wages and emotional distress. (*Id.* ¶ 43.) On March 21, 2006, H&R Block moved to dismiss the Complaint for failure to state a claim.

## **II. STANDARD OF REVIEW**

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, courts must accept as true all factual allegations plead in the complaint and must draw all reasonable inferences in favor of the non-moving party. *Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001).

Courts are not obligated, however, to credit the complaint's "bald assertions" or "legal conclusions." *In re: Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429 (3d Cir. 1997) (citation omitted). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

### III. DISCUSSION

Pennsylvania's Equal Rights Amendment reads: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."<sup>1</sup> PA. CONST. art. I § 28. H&R Block asserts three alternative grounds for dismissal of this action. First, Defendant argues that no private right of action exists under the PERA. (Mem. in Supp. of Def.'s Mot. to Dismiss Pl.'s Compl. [hereinafter Def.'s Mem.] at 1, 3.) Second, Defendant asserts that the Pennsylvania Human Relations Act ("PHRA") provides the exclusive remedy for Plaintiff's claims, and her failure to adhere to the administrative procedures established by the PHRA is fatal to her claims. (*Id.*) Third, Defendant argues that Plaintiff's claims fail because there is no state action, which is required to state a claim under the PERA. (*Id.* at 3, 9-10.) The Court addresses the first two arguments in turn. Because resolution of the second issue provides grounds for dismissal, the Court declines to reach Defendant's final argument.

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<sup>1</sup> Pennsylvania became the first state to add an equal rights amendment to its Constitution when voters ratified the PERA on May 18, 1971. See *Bartholomew v. Foster*, 541 A.2d 393, 395 n.3 (Pa. Commw. Ct. 1988).

### **A. A Private Right of Action for Damages Exists Under the PERA**

The Pennsylvania Supreme Court has not ruled on the issue of whether a private right of action exists under the PERA, and federal courts in this district are divided as to how Pennsylvania's highest court will resolve the question.<sup>2</sup> *See Barrett v. Greater Hatboro Chamber of Commerce*, Civ. A. No. 02-4421, 2005 WL 2104319, at \*4 (E.D. Pa. Aug. 19, 2005); *Cheryl S. v. County of Bucks*, Civ. A. No. 04-1880, 2004 WL 1686960, at \*2 (E.D. Pa. July 26, 2004) (citing cases). The Third Circuit has stated in dicta, "We are of the view that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA." *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). The Third Circuit further stated that "damages [ ] may be available under the state ERA." *Id.*

The existence of a private right of action under the PERA is an issue comprised of two distinct components that are often conflated by courts: (1) whether the plaintiff has standing to bring an action under the PERA to recover damages; and (2) whether such an action may be brought against a private actor in the absence of state action. Here, the Court only decides the issue of standing under the PERA to recover damages. In *Pfeiffer*, the Third Circuit did not explain whether its reference to "a private right of action" included a plaintiff's standing to bring an action, the required degree of state action by the defendant, or both. *See id.*

In *Pfeiffer*, the Third Circuit cited two cases in support of its statements about the PERA; both cases addressed the issue of state action. *See id.* (citing *Bartholomew*, 541 A.2d 393 & *Welsch v. Aetna Ins. Co.*, 494 A.2d 409 (Pa. Super. Ct. 1985)). The Pennsylvania Commonwealth Court

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<sup>2</sup> Federal courts sitting in diversity must apply Pennsylvania substantive law to predict how the Pennsylvania Supreme Court would rule on the issue. *See Nationwide Mutual Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000).

concluded in *Bartholomew* that “there is no requirement of state action” under the PERA. *Bartholomew*, 541 A.2d at 396 (relying on *Hartford Accident & Indem. v. Ins. Comm’r*, 482 A.2d 542 (Pa. 1984)). Likewise, in *Welsch* the Pennsylvania Superior Court held that state action was not necessary to state a claim under the PERA. *Welsch*, 494 A.2d at 412. Neither *Bartholomew* nor *Welsch* contained a discussion of an individual’s standing to bring an action for damages under the PERA. See *Bartholomew*, 541 A.2d at 395 (only injunctive relief sought); *Welsch*, 494 A.2d at 412-13 (plaintiffs stated viable PERA claim, but damages request not addressed because action dismissed for failure to exhaust mandatory administrative remedies).

Differing interpretations of *Pfeiffer* have emerged in this District. Compare *Barrett*, 2005 WL 2104319, at \*5 (relying on *Pfeiffer* as support for conclusion that private cause of action for damages under the PERA exists) and *Spirk v. Centennial Sch. Dist.*, Civ. A. No. 04-4821, 2005 WL 433321, at \*5 (E.D. Pa. Feb. 22, 2005) (same) with *EEOC v. Dan Lepore & Sons Co.*, Civ. A. No. 03-5462, 2004 WL 569526, at \*2 n.2 (E.D. Pa. Mar. 15, 2004) (reading *Pfeiffer* as addressing state action issue only and finding no private right of action for damages under the PERA). Other courts in this District have ignored *Pfeiffer* altogether in addressing the issue of whether a private right of action exists under the PERA. See, e.g., *Mulligan v. Abington Mem’l Hosp.*, Civ. A. No. 03-6510, 2004 WL 1047796, at \* 2 (E.D. Pa. May 4, 2004) (PERA precludes claim against purely private party); *Ryan v. Gen. Machine Prods.*, 277 F. Supp. 2d 585, 595 (E.D. Pa. 2003) (no private cause of action for damages under the PERA); *Douris v. Schweiker*, 229 F. Supp. 2d 391, 405 (E.D. Pa. 2002) (same); *Imboden v. Chowns Comm’ns*, 182 F. Supp. 2d 453, 458 (E.D. Pa. 2002) (plaintiff allowed to proceed with PERA claim without showing of state action).

Because the Third Circuit noted in *Pfeiffer* the availability of damages under the PERA, this

Court follows its suggestion that a private right of action is available under the PERA. Accordingly, the Court concludes that individuals have standing to bring an action for damages under the PERA. The Court declines to decide whether state action is a prerequisite for such an action, however, as this issue is rendered moot by the Court's resolution of the PHRA administrative exhaustion issue discussed below.

**B. The PHRA Administrative Process is Mandatory for Employment Discrimination Claims Under the PERA**

Defendant asserts that the PHRA preempts Plaintiff's claim under the PERA because the PHRA provides the exclusive remedy for claims of gender-based employment discrimination. (Def.'s Mem. at 1-3.) The Court rejects this argument; the PHRA does not preempt claims brought under the PERA. The PHRA contains a provision that states: "as to acts declared unlawful by [the PHRA,] the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned." 43 P.S. § 962(b) (2006). The Pennsylvania Supreme Court has interpreted this provision to preempt common law discrimination claims. *See Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 919 (Pa. 1989). Indeed, it is well-established under Pennsylvania law that "[t]he PHRA preempts parties from bringing common law claims for wrongful discharge based on claims of discrimination. The PHRA does not, however, address preclusion of claims under the PERA." *Imboden*, 182 F. Supp. 2d at 458 (internal citations omitted).

Moreover, the PERA was ratified by Pennsylvania voters in 1971, sixteen years after the preclusion language of Section 962(b) of the PHRA was enacted by Pennsylvania lawmakers and three years after the reference to "sex" was added to the PHRA. *See Barrett*, 2005 WL 2104319, at

\*5; *Imboden*, 182 F. Supp. 2d at 458; *McCormack v. Bennigan's & Steak & Ale of Pa., Inc.*, Civ. A. No. 93-1603, 1993 WL 293895, at \*5 n.1 (E.D. Pa. July 30, 1993). Accordingly, “[t]he Pennsylvania legislature could not have intended to preempt a right that did not exist at the time they considered the [PHRA] legislation.” *Barrett*, 2005 WL 2104319, at \*5; *see also Imboden*, 182 F. Supp. 2d at 458.<sup>3</sup>

Defendant also argues that Plaintiff’s case fails because she has not exhausted her administrative remedies as required under the PHRA. (*See* Def.’s Mem. at 1-3.) Plaintiff did not file an administrative charge of discrimination with the Pennsylvania Human Relations Commission (“PHRC”) prior to filing this action. (*See id.* at 2.) Although PERA claims are not preempted by the PHRA, the Court agrees with Defendant that Plaintiff cannot use the PERA to circumvent the administrative procedures established by the PHRA, particularly the requirement of filing a charge with the PHRC.<sup>4</sup> The Pennsylvania Supreme Court has explained the intent of the legislature in establishing the PHRC as the primary mechanism for handling employment discrimination claims as follows:

[T]he Legislature recognized that only an administrative agency with broad remedial powers, exercising particular expertise, could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the

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<sup>3</sup> In *Imboden*, the court analogized the Third Circuit’s analysis regarding the PHRA preclusion issue with respect to subsequently-enacted federal laws such as Title VII. *See Imboden*, 182 F. Supp. 2d at 458 (*citing McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 281 (3d Cir. 1989) (holding PHRA did not preempt claims under Title VII because Pennsylvania legislature could not have intended to preclude claims based on federal laws not yet in existence)).

<sup>4</sup> One court in this District identified the key issue involving PERA claims as “whether [the PHRA] is the mechanism by which the Pennsylvania constitutional provision [the PERA] is to be implemented in the employment context.” *Clark v. Amerisourcebegen Corp.*, Civ. A. No. 04-4332, 2005 WL 241179, at \*2 (E.D. Pa. Feb. 2, 2005).

Commission, quite properly, maximum flexibility to remedy and hopefully eradicate ‘the evils’ of discrimination . . . . We thus recognize that the expertise of the Commission in fashioning remedies is not to be lightly regarded.

*Clay*, 559 A.2d at 919 (quoting *PHRC v. Alto-Reste Park Cemetery Assoc.*, 306 A.2d 881, 887 (Pa. 1973)). The PHRA administrative framework was intended to prevent inefficient and time-consuming litigation by first allowing the PHRC to investigate, conciliate and assess discrimination claims. *See id.* at 919-20. After these administrative procedures have been exhausted, aggrieved parties may resort to the courts. *Id.* at 920. Thus, “the statutory scheme would be frustrated if aggrieved employees were permitted to circumvent the PHRC by simply filing claims in court.” *Id.*

The Pennsylvania Superior Court recently noted that, although *Clay* prohibited circumvention of the PHRA, “the *Clay* Court did not conclude that there is no alternative to the PHRA as an avenue of relief for sexual discrimination.” *Weaver v. Harpster*, 885 A.2d 1073, 1075 (Pa. Super. Ct. 2005). In *Weaver*, the court allowed an employee to bring a common-law sexual discrimination suit because her employer had an insufficient number of employees to be subject to the PHRA. *Id.* at 1078. The *Weaver* court reasoned that the plaintiff had suffered a clear legal injury in light of Pennsylvania’s public policy against gender discrimination, as articulated in both the PERA and the PHRA. *Id.* at 1077-78. Accordingly, the court found that some judicial recourse was mandated. *Id.* at 1077. Despite the fact that the plaintiff did not base her judicial action on the PHRA, however, the *Weaver* court emphasized that the plaintiff had complied with the necessary prerequisites to filing suit.

She has followed the necessary procedures to obtain redress for her grievance: initially discussing it with her superiors and then appealing to the administrative agency charges with the authority to settle such disputes. Following her dismissal by the PHRC, she turned to the courts as a last resort.



*Id.* Accordingly, the Court finds that the administrative procedures established by the PHRA are mandatory for employment discrimination claims and may not be circumvented, even if a plaintiff intends to assert his or her gender discrimination claim solely under the PERA.<sup>5</sup>

As Plaintiff failed to adhere to the PHRA framework, Plaintiff's action must be dismissed for failure to exhaust her administrative remedies. Furthermore, because the applicable statute of limitations for Plaintiff to file a claim with the PHRC has expired, the Court dismisses this case with prejudice.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant's motion to dismiss the Complaint is granted. An appropriate Order follows.

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<sup>5</sup> The Court notes that Plaintiff's assertion of a PERA claim without an accompanying PHRA claim presents a novel question. The courts in this District that have addressed the interplay between the PHRA and the PERA have done so only in the context of plaintiffs bringing both PERA and PHRA claims.

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                    **Plaintiff,**

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**H&R BLOCK MORTGAGE**  
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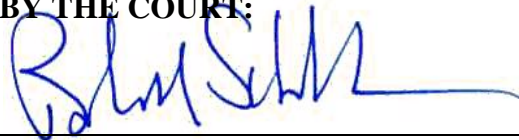
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**ORDER**

**AND NOW**, this **13<sup>th</sup>** day of **July, 2006**, upon consideration of Defendant's Motion to Dismiss Plaintiff's Complaint, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's motion (Document No. 3) is **GRANTED**.
2. The Clerk of Court is directed to close this case.

**BY THE COURT:**



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**Berle M. Schiller, J.**